SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 687

ABRAHAM NEWMAN,

Appellant,

vs.

ROBERT E. MURPHY, Warden of Auburn State Prison, Auburn, New York

---

APPEAL FROM THE SUPREME COURT, COUNTY OF CAYUGA, STATE OF NEW YORK

STATEMENT AND MOTION TO AFFIRM

May it please the Court:

Now comes the appellee in the above entitled cause, by his counsel of record, and moves that the order and judgment appealed from be affirmed.

Jurisdiction

Jurisdiction would appear to exist if the allegations of the appellant were substantial and substantiated.

Motion to Affirm

The motion to affirm is made upon the ground that the decision of the cause depends upon the resolution of the question whether the amendments to New York Correction Law Sections 212, 223 (Laws of 1936, ch. 70) and 242 (Laws of 1935, ch. 902; Laws 1948, ch. 631), as applied to the appellant who was previously convicted of a felony, are unconstitutional as being *ex post facto* laws. The pertinent statutes are contained in the appendix hereto, as they existed at the time of appellant's conviction and as later amended.

Prior to the amendments the appellant, who had been convicted in 1934 of the crime of murder, second degree, as a second offender, and sentenced to a term of twenty years to life, could only hope to be released from prison by an act of executive clemency on the part of the Governor (*People* v. *Washington*, 264 N. Y. 335, 338).

It will be noted that Sections 212 and 223 of the State Correction Law, as they were at the time of appellant's conviction, specifically excluded a prisoner previously convicted of a crime punishable by imprisonment in a state prison, from the benefits of parole therein provided. This prohibition was removed from these sections of the law by Chapter 70 of the Laws of 1936.

Thus it is apparent that the amendment of 1936 was not an *ex post facto* law. It ameliorated the conditions under which appellant previously labored by permitting him to be considered for a "statutory" commutation and he never has been deprived of possible executive clemency should the Governor so determine under his constitutional powers (New York State Constitution Article IV, § 4). In passing it is to be noted that although the Governor usually did

attach the conditions suggested by the Legislature in commuting sentences, this

> "* * * was only a courteous gesture toward the Legislature, as that body could neither add to nor detract from the explicit grant by the People of the State." (*People ex rel. Ross* vs. *Wilson*, 250 App. Div. 143, 145.)

State Correction Law Section 235, formerly numbered Section 236, is included in the appendix for the purpose of demonstrating to the Court the operative procedure to present a prisoner for consideration for parole.

The amendment of 1948 to Section 242 places the statutory discretionary power to reduce the sentence of a prisoner solely in the Prison Board but does not affect the Governor's constitutional clemency powers. Thus one agency was by statute actually eliminated from those recommending and approving such reductions, i. e., the Governor himself. The interjection of the Parole Board into the picture is not new under the 1948 amendment, inasmuch as the Parole Board was given jurisdiction over a prisoner in the appellant's position by the 1936 amendment in order to ameliorate his previous position of not being eligible to parole at all.

Since the exercise of executive clemency is an act of grace and not of right, it does not appear that any constitutional right of the appellant has been invaded. The power of executive clemency may be delegated. This Court in *Solesbee* v. *Balkcom*, 339 U. S. 9 said, p. 12:

> "Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. Such power has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the

Courts. See *Ex parte United States*, 242 U. S. 27, 42, and cases collected in Note, 38 L. R. A. 577, 587."

Opinions Below

No opinion was written by either court below. The memorandum decision of the Supreme Court, Appellate Division, Fourth Department, is reported in 279 App. Div. 627, and is as follows:

> "Order affirmed, without costs of this appeal to either party. (See *Matter of Pizza* v. *Lyons*, 278 App, Div. 65.) All concur."

The memorandum decision of the Court of Appeals is reported in 303 N. Y. Mem., p. 831, and is as follows:

> "Motion denied. No substantial constitutional question is presented. (*Matter of Pizza* v. *Lyons*, 278 App. Div. 65, affd. 303 N. Y. 736.)"

Dated: March 19, 1952.

NATHANIEL L. GOLDSTEIN,
Attorney General of the
State of New York,
Attorney for Appellant;
WENDELL P. BROWN,
Solicitor General of the
State of New York,
HERMAN N. HARCOURT,
Assistant Attorney General
of the State of New York,
Counsel for Appellee,
The Capitol,
Albany, N. Y.

APPENDIX

NEW YORK STATE CORRECTION LAW

Section 212

In 1934.

§ *212. Prisoners subject to parole.* Every person sentenced to an indeterminate sentence and confined in a state prison who has never before been convicted of a crime punishable by imprisonment in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. The time of his release shall be discretionary with the board of parole, but no such person shall be released until he has served such minimum sentence nor until he shall have served one year. The action of the board of parole in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law.

As amended by Laws of 1936.

§ *212. Prisoners subject to parole.*

Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. The time of his release shall be discretionary with the board of parole, but no such person shall be released until he has served such minimum sentence nor until he shall have served one year. The action of the board of parole in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law. As amended L. 1932, c. 457; L. 1936, c. 70, § 2, eff. March 6, 1936.

NEW YORK STATE CORRECTION LAW

Section 223

In 1934.

§ *223. Application of article.* The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison and who has never before been convicted of a crime punishable by imprisonment in a state prison. It shall not apply to any other persons. All provisions of law applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight and repealed by this act shall be transferred to the rules of the board of parole and shall continue to have the same force and effect of law as before this repeal.

As amended by Laws of 1936.

§ *223. Application of article.*

The provisions of this article shall apply to every person sentenced to an indeterminate sentence on or after July first, nineteen hundred and twenty-eight, and confined in a state prison. All rules of the board of parole applying to the parole of prisoners sentenced to prison before July first, nineteen hundred and twenty-eight, shall continue to have the force and effect of law. As amended L. 1932, c. 457; L. 1936, c. 70, § 3, eff. March 6, 1936.

NEW YORK STATE CORRECTION LAW

Section 235, formerly Section 236

In 1934.

§ 236. *Allowance of commutation and compensation to be determined by prison board; regulations respecting the same; part of commutation or compensation may be withheld.* For the purpose of applying the rules mentioned in the last section for the allowance or disallowance of commutation for the good conduct of any convict, and for the allowance of compensation under the provisions of this article

for efficient and willing performance of duties assigned, a board shall be constituted in each of the prisons of this state, to consist of the agent and warden, the principal keeper, the physician therein and the superintendent of industries, and, in each of the penitentiaries of this state, the warden or superintendent, the deputy or principal keeper and the physician therein, or of the persons acting in their place and stead. This board shall meet once in each month before the date fixed for the transmission of their report to the governor, as hereinbefore provided, and proceed to determine the amount of commutation and compensation which they shall recommend to be allowed to any convict, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to recommend the withholding of the allowance of commutation for good conduct, or compensation, or of a part thereof, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned, except that a convict received in a prison or penitentiary prior to May first, nineteen hundred and sixteen, shall be credited with an allowance of ten days compensation for each thirty day period, dating from the date of his confinement in prison to May first, nineteen hundred and sixteen. Compensation credited to a convict in the first instance, in his account, by the agent and warden, as provided in section two hundred and thirty, shall stand as the compensation allowed, unless withheld wholly or partly by the board as pnishment, as above provided.

As amended by the Laws of 1935.

§ 235. *Determination of reduction of sentence* (formerly §236).

For the purpose of applying the rules mentioned in the last section for the allowance or disallowance under the provisions of this article of reduction for the good conduct of any prisoner, and for efficient and willing performance of duties assigned, a board shall be constituted in each of the prisons of this state, to consist of the warden, the principal keeper, the physician and the officer in charge of industries therein

and, in each of the penitentiaries of this state, the warden or superintendent, the deputy or principal keeper and the physician therein, or of the persons acting in their place and stead. This board shall meet once in each month before the date fixed for the transmission of their report to the governor, as hereinbefore provided, and proceed to determine the amount of reduction of sentence which they shall recommend to be allowed to any prisoner, which shall not in any case exceed the amount fixed by this article. They shall have full discretion to recommend the withholding of the allowance of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, or of a part thereof, as a punishment for offenses against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided. Formerly § 236, renumbered 235 and amended L. 1935, c. 902, § 7, eff. June 1, 1935.

NEW YORK STATE CORRECTION LAW

Section 242, formerly Section 243

In 1934.

§ 243. *Governor to annex condition to discharge.* (Later renumbered § 242.) The governor shall, in reducing the sentences of prisoners not subject to the jurisdiction of a board of parole, annex a condition that such prisoner shall live and remain at liberty without violating the law, and be subject to the jurisdiction and control of the board of parole as provided in article eight hereof, and also a condition to the effect that if any such prisoner shall, during the period between the date of his discharge by reason thereof and the date of the expiration of the full term for which he was sentenced, commit a felony within this state, or commit a crime under the laws of any other state, government, or country, which if committed within this state would be a felony, and if he shall be convicted of such crime at any time, he shall, in

addition to the sentence which may be imposed for such felony be compelled to serve in a state prison the remainder of the term of his previous state prison sentence without commutation which he would have been compelled to serve but for such commutation, as provided for in this article.

As amended by Laws of 1935.

§ 242. *Governor to annex condition to discharge.*

The governor shall, in reducing the sentences of prisoners not subject to the jurisdiction of a board of parole, annex a condition that every such prisoner shall live and remain at liberty without violating the law, and be subject to the jurisdiction and control of the board of parole as provided in article eight hereof, and also a condition to the effect that if any such prisoner shall, during the period between the date of his discharge by reason thereof and the date of the expiration of the full term for which he was sentenced, commit a felony within this state, or commit a crime under the laws of any other state, government, or country, which if committed within this state would be a felony, and if he shall be convicted of such crime at any time, he shall, in addition to the sentence which may be imposed for such felony be compelled to serve in a state prison the remainder of the term of his previous state prison sentence without reduction which he would have been compelled to serve but for such reduction, as provided for in this article. Formerly § 243, amended L. 1931, c. 458; L. 1932, c. 297; renumbered 242, and amended L. 1935, c. 902, § 9, eff. June 1, 1935."

As amended in 1948.

§ 242. *Condition to be annexed to discharge.*

In reducing the sentences of prisoners not subject to the jurisdiction of a board of parole, the board herein provided for determining reduction of sentence shall annex a condition that every such prisoner shall live and remain at liberty without violating the law, and be subject to the jurisdiction and control of the board of parole as provided in article eight hereof, and also a condition to the effect that if any

such prisoner shall, during the period between the date of his discharge by reason thereof and the date of the expiration of the full term for which he was sentenced, commit a felony within this state, or commit a crime under the laws of any other state, government, or country, which if committed within this state would be a felony, and if he shall be convicted of such crime at any time, he shall, in addition to the sentence which may be imposed for such felony be compelled to serve in a state prison the remainder of the term of his previous state prison sentence without reduction which he would have been compelled to serve but for such reduction, as provided for in this article. As amended L. 1948, c. 631, § 1, eff. July 1, 1948.

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IN THE

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October Term, 1951

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APPEAL FROM THE SUPREME COURT, COUNTY OF CAYUGA, STATE OF NEW YORK

BRIEF IN OPPOSITION TO A STATEMENT AND MOTION TO AFFIRM

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BATAVIA TIMES LAW PRINTERS,
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